Supreme Court, U. S.
FILED
DEC 15 1979
MICHAEL RODAK, JR., CLERK

No. 79-656

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL J. MANCHESTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 17-19) is listed at 605 F. 2d 1198 (Table). The memorandum opinion and order of the district court (Pet. App. 22-27) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A petition for rehearing was denied on September 28, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" that affects interstate commerce and is conducted through a pattern of

racketeering activity, extends to illicit as well as legitimate enterprises or requires a showing that a defendant is connected with "organized crime."

2. Whether a person may be convicted both of a substantive racketeering offense, in violation of 18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d).

3. Whether the evidence was sufficient to sustain petitioner's convictions.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of participating in the affairs of an enterprise conducted through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), one count of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), one count of mail fraud, in violation of 18 U.S.C. 1341, two counts of subscribing to a false income tax return, in violation of 26 U.S.C. 7206(1), and one count of aiding or assisting in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2).[1] Petitioner was sentenced to concurrent terms of six months' imprisonment on the substantive

[1]The jury acquitted petitioner on one count of mail fraud. Following the verdict, the government acquiesced in petitioner's motion for judgment of acquittal on two tax counts (Pet. App. 27). In all other respects, the district court denied petitioner's post-trial motion for judgment of acquittal or a new trial (*ibid.*).

Prior to trial, five of petitioner's co-defendants pleaded guilty to one or more counts. A corporate co-defendant, Rad-O-Lite of Philadelphia, Inc., was charged with one count of conspiracy, in violation of 18 U.S.C. 1962(d). Rad-O-Lite was convicted at a joint trial with petitioner and was sentenced to a fine of $5,000. Rad-O-Lite took a separate appeal and is not a petitioner in this case.

racketeering count and the tax count. Imposition of sentence on all other counts was suspended.

1. Petitioner was the chief executive officer and part owner of Rad-O-Lite of Philadelphia, Inc. The company produced what is called a "preemption device"—a traffic control system that enables the operator of an emergency vehicle to cause traffic signals to turn green for him and red for all other traffic by activating a radio device in the emergency vehicle (Pet. 3-4). Joseph Barszowski was an assistant traffic engineer in the Pennsylvania Department of Transportation ("PENNDOT"). Barszowski was assigned to the PENNDOT office for Southeastern Pennsylvania, known as District Six. "For all practical purposes, Barszowski ran District Six" (Pet. 4).

In brief, the evidence at trial showed that Barszowski, in return for large sums of money and other things of value, was the ringleader of a scheme to assist certain businessmen, including petitioner, to sell Rad-O-Lite's traffic safety equipment (Pet. 5-6). The scheme centered on the imposition of a requirement that traffic safety equipment, to be eligible for use in traffic safety improvement projects in District Six, must have a "preemption capability." This requirement was imposed only in District Six, where Barszowski was the final authority on specifications (A. 211a-229a, 245a).[2] Moreover, Barszowski designed this specification in such a way that it could be met only by Rad-O-Lite's product (A. 214a-217a; GX 318, 319). The scheme resulted in the sale of approximately 400 Rad-O-Lite preemption units

[2]"A." refers to the joint appendix filed in the court of appeals; "GX" refers to the government's exhibits in the district court. Because the record was not available to us in time to prepare this Brief in Opposition, the citations herein are taken from the government's brief in the court of appeals.

at a cost to PENNDOT of $1,600 apiece. Of this amount, approximately $850 per unit was paid to Rad-O-Lite (Pet. 6); the rest of the inflated price primarily represented excessive sales commissions received by co-defendant Harry Weigand (A. 138) and Barszowski's share of the sales, which alone amounted to $139,000 (A. 43-65; GX 158, 161, 165, 167, 171, 173, 178, 186, 191, 196, 201, 204, 208, 213, 216, 217, 219, 224, 226, 231, 233, 235, 239, 241, 244, 245, 250, 252, 253, 257, 260, 263, 266, 268). No Rad-O-Lite preemption unit was ever sold outside District Six (A. 129a-130a). Barszowski's ultimate plan was to initiate a "sales campaign" to have PENNDOT and various municipalities install completely functioning Rad-O-Lite preemption units throughout the state at an additional cost of between $2,500 and $3,200 per unit (A. 195a).[3]

2. The "enterprise" specified in the racketeering counts of the indictment was the group of individuals associated in fact "for the purpose of corruptly influencing and seeking to influence the administration of traffic safety improvement projects in PENNDOT District Six by means of bribery and fraud and the concealment thereof" (Pet. 9). In order to show that petitioner knowingly participated in this criminal enterprise, the government presented evidence that petitioner, the chief executive officer of Rad-O-Lite, told two employees of Rad-O-Lite that Barszowski was his "silent partner" and that "big

[3]This part of the scheme was thwarted by mid-1975 when PENNDOT headquarters in Harrisburg became aware of the significantly higher costs of traffic signal equipment in District Six than in other districts. An investigation revealed that a substantial portion of the excess cost resulted from the unique provision for preemption capability that Barszowski had written into the specifications for projects in District Six. The Harrisburg officials informed Barszowski that they would no longer pay for the installation of preemption equipment (A. 244a-248a; GX 321).

things" were going to happen to the company as a result (A. 83, 149a). Petitioner directed Rad-O-Lite's bookkeeper to send copies of invoices for sales of the preemption units to the home address of his "silent partner" (A. 134). In addition, blind copies of Rad-O-Lite's and petitioner's key correspondence were sent to Barszowski (A. 54-59, 136a-140a, 289a; GX 270, 272, 273, 885-887). Barszowski presided over meetings, held at Rad-O-Lite's office, of the individuals involved in the scheme (A. 188a), and Barszowski and petitioner conferred privately during these meetings on prices for Rad-O-Lite equipment (A. 189a). Barszowski also delivered to petitioner checks made payable to Rad-O-Lite for the preemption units (A. 189a, 280a), helped to expedite payments to Rad-O-Lite (A. 191a, 194a), and used his influence to obtain two large loans for petitioner (A. 193a, 198a, 286a-289a). These loans and petitioner's repayments were delivered through Barszowski (*ibid.*). On occasions when Barszowski came to the Rad-O-Lite office accompanied by other PENNDOT officials, petitioner instructed Rad-O-Lite employees to act as though they did not know Barszowski (A. 85, 114a). Petitioner also repeatedly complained to Rad-O-Lite employees about the large amount of money Barszowski was receiving from Rad-O-Lite and the minimal benefits the company had obtained in return (A. 84, 97, 113a).[4]

[4]On one occasion, petitioner said "[t]hat god damn Joe [Barszowski] is bleeding me dry and getting 10% while I am breaking my ass" (A. 84, 97). On another occasion, petitioner complained that Barszowski "and these other people are getting money out of us and we are struggling to make a living and have to pay the bills and everything else and they are doing very little for what they get" (A. 113a).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the decision below is in conflict with the recent decision of the Sixth Circuit in *United States* v. *Sutton*, 605 F. 2d 260 (1979), which held that the term "enterprise," as defined in 18 U.S.C. 1961(4) and employed in 18 U.S.C. 1962-1964, includes only legitimate businesses or operations and does not include associations or organizations established solely for unlawful purposes. However, petitioner never raised this issue of the scope of the term "enterprise" in the courts below, and therefore neither the district court nor the court of appeals addressed it. Having failed to present his argument to the lower courts, petitioner should not be permitted to raise it now for the first time in this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, as we recently informed this Court in connection with the pending petition for a writ of certiorari in *Little* v. *United States*, No. 79-5013 (a copy of our submissions in *Little* are being sent to petitioner), the Sixth Circuit has granted the government's petition for rehearing en banc in *Sutton* and has vacated the panel's decision. Accordingly, there is at present no conflict among the circuits on this issue, since every other court of appeals to have passed upon the question has concluded that 18 U.S.C. 1962 reaches illegitimate as well as legitimate enterprises that are conducted through a pattern of racketeering activity.[5] *United States* v.

[5]Moreover, each court of appeals to have addressed the question has held that the term "enterprise" encompasses governmental units. *United States* v. *Grzywacz*, 603 F. 2d 682 (7th Cir. 1979); *United States* v. *Frumento*, 563 F. 2d 1083, 1089 (3d Cir. 1977); *United States* v. *Brown*, 555 F. 2d 407, 415 (5th Cir. 1977).

Aleman, Nos. 78-1782 and 78-1783 (7th Cir. Oct. 30, 1979); *United States* v. *Rone*, 598 F. 2d 564 (9th Cir. 1979), petition for cert. pending *sub nom. Little* v. *United States*, No. 79-5013; *United States* v. *Swiderski*, 593 F. 2d 1246 (D.C. Cir. 1978), cert. denied, No. 78-6227 (Apr. 30, 1979); *United States* v. *Elliott*, 571 F. 2d 880, 896-899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Altese*, 542 F. 2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977).[6] And, for the reasons elaborated in our Brief in Opposition in *Little* v. *United States*, at 4-8, we submit that these decisions have correctly resolved the issue.

Petitioner also confuses (Pet. 11) the issue presented in *Sutton* with the question whether 18 U.S.C. 1962 reaches individuals who are not connected with "organized crime." Although petitioner did raise this latter question in the courts below, it was properly rejected (Pet. App. 19, 24-25). The language of the statute and its legislative history make plain, and the courts have uniformly agreed, that the statute is not restricted in application to the activities of "organized crime." See *United States* v. *Aleman*, *supra*, slip op. 6-7; *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Mandel*, 415 F. Supp. 997, 1018-1019 (D. Md. 1976), subsequent opinion, 591

[6]Moreover, even if there were a conflict in the circuits on this issue, this would be an unsuitable case in which to resolve the question. Aside from the fact that the issue was not raised or decided below, the case actually centers upon a legitimate business enterprise—Rad-O-Lite—conducted through a pattern of racketeering activity. There would be no *Sutton* question here at all had the indictment been cast in slightly different terms to define the "enterprise" as Rad-O-Lite rather than as the group of individuals associated for the purpose of corruptly influencing, by means of bribery and fraud, the traffic safety improvement projects in PENNDOT District Six (see page 4, *supra*).

F. 2d 1347 (4th Cir. 1979); 116 Cong. Rec. 18913-18914 (1970) (remarks of Sen. McClellan); *id.* at 35344 (remarks of Rep. Poff). See also *United States* v. *Culbert*, 435 U.S. 371, 374-380 (1978); Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes*, 69 J. Crim. L.C. & P.S. 1, 9-10 (1978). Petitioner offers no reason to doubt the soundness of this conclusion.

2. Petitioner next contends (Pet. 12-13) that he may not be convicted both of a substantive offense under 18 U.S.C. 1962(c) and of conspiracy to commit that offense under 18 U.S.C. 1962(d). In petitioner's view, these are merely "two different labels [for] what can only properly be considered as a single course of action" (Pet. 13). For the reasons stated in our Brief in Opposition in *Little* v. *United States*, at 9-12, this claim is without merit as a matter of statutory construction.

Nor is there any constitutional objection to the fact that Sections 1962(c) and (d) establish as separate offenses, and authorize cumulative punishments for, discrete acts that are part of "a single course of action by petitioner" (Pet. 13).[7] Congress is free, under the Double Jeopardy Clause, to define crimes and fix their punishment. See, *e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 69-70 & n.24 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). In particular, the Double Jeopardy Clause does not bar Congress from treating as separate offenses, subject to cumulative penalties, the commission

[7]We also note the abstract nature of any such claim in this case, since petitioner's sentence on the substantive racketeering count is concurrent with his sentence on the tax count and since petitioner received suspended sentences on all other counts, including the conspiracy count.

of a crime and a conspiracy to commit the crime. *Iannelli* v. *United States*, 420 U.S. 770 (1975).[8] As the Court held in *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946):

> It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U.S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U.S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses.

See also *Pereira* v. *United States*, 347 U.S. 1, 11 (1954).

3. Petitioner's final contention (Pet. 13-14) is that the evidence was insufficient to sustain his convictions. The courts below rejected this argument (Pet. App. 19, 26-27), and, as petitioner recognizes (Pet. 13), further review by this Court is unwarranted. See *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

In any event, petitioner's claim is insubstantial. With regard to the racketeering counts, as summarized above (pages 3-5, *supra*), petitioner's knowing and active involvement in the unlawful scheme was established by

[8]Since a single individual, without acting in concert with other persons, can conduct the affairs of an enterprise through a pattern of racketeering activities in violation of the statute, the double jeopardy issues alluded to in *Jeffers* v. *United States*, 432 U.S. 137 (1977), and presented in *Whalen* v. *United States*, No. 78-5471, argued November 27-28, 1979, are not presented here.

overwhelming evidence. With respect to the tax count,[9] the evidence showed that approximately $38,000 in income was not reported on Rad-O-Lite's federal income tax return for fiscal year 1974, that this $38,000 was attributable to four checks from petitioner's co-conspirators that were not entered in Rad-O-Lite's books for that year, that petitioner was the chief executive officer of Rad-O-Lite and had ultimate responsibility for its books and records, and that petitioner was generally involved with the books and the incoming payments on a day-to-day basis (A. 320a, 321a, 128a-129a, 143a). This evidence provided adequate grounds for the jury to convict petitioner and to reject his explanation of the $38,000 omission as an accounting error (Pet. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

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[9]Petitioner's sentence on the tax count is concurrent with his sentence on the racketeering count. In addition, petitioner is not eligible for parole because he was sentenced to a term of less than one year and the district court did not specifically provide for his release on parole under 18 U.S.C. 4205(a), (f). Thus, petitioner is unlikely to suffer any adverse consequences because of the tax count, and it is accordingly unnecessary for the Court to consider the sufficiency of the evidence to support that conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

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